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No. 80-1771

In The Supreme Court of the United States

OCTOBER TERM 1980

HYDROLEVEL CORPORATION, *Respondent-Petitioner*

v.

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner-Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD R. TYLER, JR.
Attorney for The American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

TABLE OF CONTENTS

	PAGE
Counter-Statement of the Case	1
Reasons for Denying the Writ	1
Conclusion	4

TABLE OF AUTHORITIES

CASES

Autowest, Inc. v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970) 2

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 3

Herman Schwabe, Inc. v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) 2

Hydrolevel Corp. v. *The American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980) ..... *passim*

United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 3

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 3

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF HYDROLEVEL CORPORATION

Petitioner-Respondent The American Society of Mechanical Engineers ("ASME") respectfully submits this brief in opposition to a Petition for a Writ of Certiorari filed by Respondent-Petitioner Hydrolevel Corporation ("Hydrolevel"), Docket Number 80-1771, to review that part of a decision of the United States Court of Appeals for the Second Circuit reversing a judgment of $7.5 million and remanding for further proceedings on damages.

COUNTER-STATEMENT OF THE CASE

For its counter-statement of the case, ASME respectfully refers the Court to the Statement of the Case contained in ASME's Petition for a Writ of Certiorari, Docket Number 80-1765, at pages 2 through 10.

REASONS FOR DENYING THE WRIT

Although affirming the jury's finding of liability against ASME in this case, the Second Circuit panel reversed the damages award and remanded for further proceedings, noting that the damages verdict "was grossly excessive," was unsupported by sufficient evidence and may have been based upon irrelevant or unconnected facts. A-22.* For the reasons that follow, it is clear that the panel's conclusion in this regard was eminently sound and correct, and that there is no reason for this Court to exercise its discretion to review the damages portion of the decision.

First, Hydrolevel incorrectly states the basis for the panel's reversal. The real basis for the reversal was that there simply was no credible or relevant evidence to support the view that Hydrolevel, a mismanaged and undercapitalized company which had never in its entire existence made a profit,

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* Citations to the Court of Appeals opinion in *Hydrolevel Corp. v. The American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980) as it appears in the Appendix to ASME's Petition for Certiorari are in the above form.

had suffered damages in the amount of $3.3 million. *See* A-21 to A-22. The predominant theme of Hydrolevel's Petition is that the damages verdict was reversed because of a new theory of "relative" or "comparative culpability." *See* Hydrolevel Petition, at pp. 9, 10, 11, 12 and 17. In fact, in its entire discussion of the damages award, the panel never once discussed the relative culpability of ASME compared with its co-defendants (*see* A-21 to A-25); instead, the sole mention of this concept in the opinion is on the final page thereof, in the context of detailing the consideration to be given in assessing appropriate attorneys' fees to "the amount of time spent in preparing the case against M&M and Hartford, both of whom were far more culpable than ASME." A-26 (footnote omitted). In short, the Second Circuit panel followed its own precedent (and common sense) by holding, in effect, that a damages verdict should not stand if it "rested on assumptions that ranged from demonstrably false to unreasonable and contrary to common sense." *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 566 (2d Cir. 1970); *see also Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). This routine application of settled law to the record in this case provides no basis for this Court to exercise its discretionary jurisdiction.

Second, Hydrolevel's lengthy discussion of the defense of "withdrawal" in conspiracy cases also misinterprets what the panel held.* Once it had determined that the damages

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* Hydrolevel also asserts that ASME "never pleaded or argued" a theory of "retraction" or "withdrawal" throughout the entire District Court and appellate proceedings. This is profoundly misleading. ASME persistently argued in the District Court and the Court of Appeals that no evidence showed its intentional participation in a conspiracy and that its actions at all times were entirely proper and in accord with its established procedures. As a matter of logic and of common sense, this argument necessarily encompasses the less extensive proposition that ASME's participation, if any, was limited in duration. More specifically, ASME argued in both its principal and reply briefs to the Court of Appeals that the June 9, 1972 letter was precisely the "corrective" measure requested by Hydrolevel and constituted an appropriate response to M&M's misuse of the April 29, 1971 letter. A. Br. 22-23; A.R. Br. 3. In addition, ASME argued at length during the appellate proceedings that the June 9, 1972 "retraction" letter showed ASME's deliberate effort to cure whatever damages may have been caused, even inadvertently, by the April 29, 1971 letter.

verdict was unsupported by appropriate evidence and thus should be reversed, the Court discussed certain limits to the retrial on damages. Since ASME's sole contribution to the conspiracy was the April 1971 letter, the panel concluded, "a suitable retraction . . . was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, its responsibility for damages was at an end when it provided Hydrolevel with a means of correcting the false impressions caused by the April 1971 letter which M&M had been using." A-23. Thus, the panel described precisely how ASME had withdrawn from the conspiracy and remanded for a retrial on the amount of damages. While the panel left to the District Court the determination of whether there are additional "factual issues as to the retraction and its effectiveness" (A-24), there can be no doubt that, in the absence of additional facts, the June 1972 letter constituted an affirmative and unequivocal act to disavow or defeat the purpose of the conspiracy—in short, a complete withdrawal.

Finally, and most importantly, Hydrolevel does not raise any issue as to which there is a conflict among the federal Courts of Appeal or which is of any general significance in the administration of federal antitrust laws. As emphasized by the decisions of this Court upon which Hydrolevel purports to rely, a jury in an antitrust case "may not render a [damages] verdict based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Rather, the federal appellate courts are directed to reverse excessive antitrust awards if, "on the entire evidence, [the courts are] left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), quoting from *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In this case, the appellate panel reviewed the record and concluded for several reasons that a "mistake had been committed," stating: "Review of the record leads to the inescapable conclusion that the verdict was grossly excessive." A-22.

Thus, unlike the important legal issues raised in ASME's Petition for review of the portion of the panel's opinion regarding standards for antitrust liability, which will affect

virtually every antitrust proceeding involving a corporate defendant and which will have a profoundly adverse effect on many voluntary membership organizations, Hydrolevel is complaining, in essence, only about the panel's characterization of the specific facts of this case. These limited factual issues do not warrant this Court's review of the damages portion of the decision.

CONCLUSION

Hydrolevel's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HAROLD R. TYLER, JR.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Attorney for The American Society of Mechanical Engineers, Inc.

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN

PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

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